Filed 10/30/12 Haycock v. General Electric Money Bank CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

DON H. HAYCOCK, Plaintiff and Appellant, v. GENERAL ELECTRIC MONEY BANK et al., Defendants and Respondents.	B236803 (Los Angeles County Super. Ct. No. YC063286)

APPEAL from a judgment of the Superior Court of Los Angeles County, Cary Nishimoto, Judge. Affirmed.

Don H. Haycock, in pro. per., for Plaintiff and Appellant.

O'Rielly & Roche, Daniel J. O'Rielly and Heather C. Parker for Defendants and Respondents.

Plaintiff and appellant Don H. Haycock (Haycock), an attorney appearing in propria persona, appeals a judgment on the pleadings in favor of defendants and respondents GE Money Bank (the Bank) and General Electric Company (collectively, GE or respondents).

Haycock alleged that on August 14, 2009, he purchased hearing aids for $2,495 on a 12-month deferred interest loan, that he paid the balance in full within the 12-month period, but GE fraudulently refused to honor the no-interest financing plan. Haycock attached copies of his credit card statements to his complaint. The promotional purchase agreement, set forth on the Bank's credit card statement, provided: "You will incur no Finance Charges on a Deferred Interest promotional purchase, provided the promotional purchase amount is paid in full by the indicated Promotional Expiration Date *and you pay, by the Payment Due Date, each Minimum Payment Due on your Account* prior to the Promotional Expiration Date. If you do not satisfy these requirements, Finance Charges accrued from the date of purchase will be added to your Account." (Italics added.) The November 15, 2009 credit card statement, attached to the pleading, showed that on November 7, 2009, Haycock incurred a late fee.

Thus, Haycock's complaint showed on its face that by virtue of the late payment, Haycock became ineligible for the no-interest financing plan. Therefore, Haycock failed to state a cause of action against GE for fraudulently charging him interest on the loan. The judgment is affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

The matter has a convoluted procedural history.

1. *Original complaint and supporting exhibits*.

On September 22, 2010, Haycock filed suit against GE, alleging a cause of action for fraud and seeking punitive damages. Haycock pled that on August 14, 2009, he purchased two hearing aids for $2,495 from Affordable Hearing Aid Networks and financed the purchase with the Bank, which "verbally approved" a 12-month interest free loan. He fully paid the $2,495 loan within the 12-month period but the Bank charged him

interest continuously from the inception. Haycock also pled that Bank had made adverse reports to credit agencies, and thereby damaged his credit.

Haycock attached various exhibits to his complaint, including copies of his credit card statements. As indicated, the credit card statements contained the following advisement: "You will incur no Finance Charges on a Deferred Interest promotional purchase, provided the promotional purchase amount is paid in full by the indicated Promotional Expiration Date *and you pay, by the Payment Due Date, each Minimum Payment Due on your Account* prior to the Promotional Expiration Date. If you do not satisfy these requirements, Finance Charges accrued from the date of purchase will be added to your Account." (Italics added.) The November 15, 2009 credit card statement showed that on November 7, 2009, Haycock incurred a late fee.

2. *The initial motion for judgment on the pleadings.*

On February 25, 2011, GE filed a motion for judgment on the pleadings, contending the complaint failed to state a cause of action in that the complaint on its face showed that Haycock failed to make the required monthly payments on time. As a result, the Bank terminated the interest-free promotion on the account and charged Haycock the accrued amount of the interest which had been conditionally deferred.

GE also asserted the Bank's corporate parent was not a proper defendant. GE further contended the complaint failed to allege fraud with specificity.[1]

3. *Haycock's opposition papers*.

In opposing the motion for judgment on the pleadings, Haycock argued, inter alia, the August 14, 2009 agreement did not include a requirement that each minimum payment on the account be paid timely, and defendants could not retroactively impose conditions that contradicted the August 14, 2009 agreement.

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[1] "The requirement of specificity in a fraud action against a corporation requires the plaintiff to allege the names of the persons who made the allegedly fraudulent representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written." (*Tarmann v. State Farm Mut. Auto. Ins. Co*. (1991) 2 Cal.App.4th 153, 157.)

Haycock appended as Exhibit A a document captioned "New Promotional Financing Plans," and argued said document was the entire agreement of the parties. Haycock emphasized that Exhibit A did not specify that each minimum payment must be made timely in order to avoid being billed for deferred interest.[2]

4. *Trial court's ruling*.

On March 30, 2011 the matter came on for hearing. The trial court granted GE's motion for judgment on the pleadings with 60 days leave to amend.

The trial court ruled Haycock's cause of action for fraud lacked specificity with respect to, inter alia, who made the representations, their authority to speak on behalf of the defendants, what was specifically represented, and how the representations induced Haycock's reliance.

Further, the document that Haycock attached "clearly indicates that it is only a summary of key terms. Therefore, plaintiff could not have justifiably relied on these documents in his belief that minimum payments need not be made to qualify for the promotion. The documents attached to the Complaint appear to indicate that in October and November 2009 plaintiff did not make timely monthly payments."

5. *Haycock failed to amend his complaint during the 60-day period*.

Although the trial court had granted Haycock 60 days leave to amend, Haycock did not avail himself of that opportunity.

Instead, on May 23, 2011, nearly two months after the trial court granted him leave to amend, Haycock filed a "Second Opposition to Defendants' Motion for

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[2] Exhibit A does not support Haycock's position. This one-page document stated: "This is only a summary of key terms. Additional terms and conditions of promotional financing plans will be provided to you if you select and qualify for a plan. You may lose the benefit of any promotional terms if you fail to keep your account in good standing."

Thus, Exhibit A did not purport to set forth all the terms of the agreement. Moreover, Exhibit A cautioned that failure to maintain the account in good standing could result in a loss of the benefits of the zero-interest promotion.

Judgment on Pleadings." However, there was no pending motion for judgment on the pleadings; the trial court already had ruled on GE's motion two months earlier.

6. *GE's motion for entry of judgment based on Haycock's failure to amend his pleading; trial court was unable to grant GE's motion because Haycock filed an amended complaint in the interim.*

On June 16, 2011, GE filed a motion for entry of judgment on the ground Haycock had failed to amend his complaint within the time allowed by the court following GE's motion for judgment on the pleadings.

GE's motion for entry of judgment was scheduled to be heard on July 18, 2011.

On July 8, 2011, ten days before the hearing date, Haycock filed a document captioned "Amended Verified Complaint for Fraud; and for Actual and Punitive damages (proposed)." Although the document was captioned as a complaint, it was essentially a memorandum of points and authorities.

On July 8, 2011, Haycock also filed a document captioned "Plaintiff's Opposition to Defendants' Second Motion for Judgment on Pleadings." This document was a reiteration of the legal arguments that Haycock made in the proposed amended complaint filed that same day.

On July 18, 2011, GE's motion for entry of judgment came on for hearing. The trial court denied GE's motion without prejudice, on the ground that "when an amended pleading is filed after the time to amend has expired, the court cannot enter judgment until after defendants move to strike the pleading. Here, plaintiff filed a proposed Amended Verified Complaint after this motion was filed."

7. *GE files another motion for entry of judgment; trial court grants the motion.*

On July 28, 2011, GE filed a motion to strike Haycock's "Amended Verified Complaint" and for entry of judgment in favor of defendants. GE argued the amended complaint was untimely, it contained irrelevant and improper matter, and it failed to cure the defects in the original complaint.

On September 7, 2011, the matter came on for hearing. The trial court ruled the amended complaint for fraud "was untimely and fails to state a cause of action against either Defendant." The trial court granted GE's motion to strike Haycock's amended complaint and entered judgment in GE's favor. This appeal followed.

CONTENTIONS

As GE points out, Haycock's opening brief does not present an intelligible argument as to how the trial court erred in any of its rulings. Because the case was resolved below by way of a motion for judgment on the pleadings, we focus our review on whether Haycock's factual allegations are sufficient to constitute a cause of action.

DISCUSSION

1. *Standard of review*.

A motion for judgment on the pleadings is analogous to a general demurrer, but is made after the time to file a demurrer has expired. (Code Civ. Proc., § 438, subd. (f)(2);[3] *Ludgate Ins. Co. v. Lockheed Martin Corp*. (2000) 82 Cal.App.4th 592, 602.) The trial court's judgment on the order granting a motion for judgment on the pleadings is reviewed independently under the de novo standard of review. (*Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal.4th 468, 515.) The essential issue before us is whether the factual allegations that the plaintiff makes are sufficient to constitute a cause of action. (*Ibid*.)

2. *The pleading on its face discloses Haycock became ineligible for the zero interest promotional plan by failing to make his payments timely; therefore, Haycock failed to state a cause of action against GE for fraud*.

Haycock alleged that in GE's first billing statement (which he appended to the complaint), GE "formally acknowledge[d] deferment of interest for 12-months from August 14, 2009. To wit: 'Promotional Expiration Date to September 14, 2010.' " Haycock also quoted GE's representation of " 'No interest if Paid Within Promotional Period.' "

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[3] All further statutory references are to the Code of Civil Procedure, unless otherwise specified.

The gravamen of Haycock's position is that the "terms and conditions of [GE's] no-interest loan clearly provide for 'no interest' to the borrower *if fully paid within the loan period.*" (Italics added.) In support, Haycock relies on a one-page summary of various promotional plans offered by GE, which Haycock obtained when he purchased the hearing aids. With respect to the "no interest if paid within promotional period," the one-page document states: "Under this promotion, there is no interest on the promotional purchase if the promotional purchase is paid in full by the end of the promotional period."

However, said one-page document was merely a "summary" of various promotional plans and expressly did not constitute the entire agreement of the parties. The document also contained the following advisement: "*This is only a summary of key terms.* Additional terms and conditions of promotional financing plans will be provided to you if you select and qualify for a plan. *You may lose the benefit of any promotional terms if you fail to keep your account in good standing*." (Italics added.)

Thus, Haycock's characterization of the agreement was inaccurate. Moreover, the credit card statements which were appended to his complaint contained the following advisement under the heading PROMOTIONAL PURCHASE SUMMARY: "You will incur no Finance Charges on a Deferred Interest promotional purchase, *provided* the promotional purchase amount is paid in full by the indicated Promotional Expiration Date and *you pay, by the Payment Due Date, each Minimum Payment Due on your account prior to the Promotional Expiration Date*. *If you do not satisfy these requirements, Finance Charges accrued from the date of purchase will be added to your Account*."

The face of the pleading established it was infirm. The credit card statements which Haycock appended to his original complaint indicated he lost his eligibility for the promotional financing plan because he failed to make all his payments timely. The September 15, 2009 statement indicated that a minimum payment of $75.00 was due on *October 8, 2009*. Haycock paid more than the minimum payment that month -- he made a payment of $200.00. However, Haycock admits he did not make the payment until October 12, 2009, four days *after* the due date, and the payment posted on October 15, 2009. Further, a subsequent statement, dated November 15, 2009, showed that on

November 7, 2009, he was charged a $39.99 late fee. Thereafter, the February 15, 2010 statement notified Haycock as follows: "Your promotion(s) have been terminated because minimum monthly payment(s) on your account were not paid when due. Finance Charges have been added to your account, and non-promotional account terms now apply."

Given the exhibits which Haycock appended to his original complaint, Haycock failed to allege GE fraudulently refused to honor its agreement to defer interest for 12 months on the hearing aids. Although Haycock alleged he "fully paid the purchase price within seven-months," that is not the issue. Haycock's eligibility for the promotional financing plan depended on his making all the required monthly minimum payments *timely*. Because Haycock failed to make all payments timely, he is incapable of alleging GE defrauded him by adding finance charges to his account.

3. *Sanctions for frivolous appeal*.

GE contends the appeal is frivolous and it requests $6,848.90 in sanctions for a frivolous appeal. This court notified Haycock that it was considering sanctions (Cal. Rules of Court, rule 8.276(c)) and that oral argument on the issue of sanctions would be combined with oral argument on the merits of the appeal. We conclude sanctions are warranted. This opinion constitutes the written statement of reasons required by *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 654 (*Flaherty*).)

Haycock's appeal is frivolous because it indisputably has no merit—"any reasonable attorney would agree that the appeal is totally and completely without merit." (*Flaherty, supra,* 31 Cal.3d at p. 650.) The principles guiding the determination whether an appeal is frivolous were described in *Flaherty, supra,* 31 Cal.3d at p. 650, and include both subjective and objective standards: "[A]n appeal should be held to be frivolous only when it is prosecuted for an improper motive—to harass the respondent or delay the effect of an adverse judgment—or when it indisputably has no merit—when any reasonable attorney would agree that the appeal is totally and completely without merit." (Accord, *Millennium Corporate Solutions v. Peckinpaugh* (2005) 126 Cal.App.4th 352, 360.)

This case involves a clear instance of an appeal that indisputably has no merit. No reasonable attorney, reviewing Haycock's complaint and the exhibits attached thereto, could have made the assertion that Haycock was entitled to the benefit of the no-interest promotion simply by repaying the loan within the 12-month promotional period. It was abundantly clear, both from the one-page promotional summary and from the credit card statements, that failure to pay each minimum payment by the payment due date would result in the borrower losing the benefit of the no interest promotion.

On this record, GE's request for sanctions is warranted. Therefore, following notice and a hearing, and having reviewed the declaration of GE's counsel, we award sanctions to GE in the amount of $3,000.00.

4. *Haycock's litigation conduct qualifies him for vexatious litigant status.*

This court, on its own motion, issued an order to show cause as to whether Haycock should be declared a vexatious litigant and subject to a a prefiling order pursuant to section 391.7.[4] The order to show cause was heard in conjunction with the motion for sanctions and oral argument on appeal.

a. *Statutory scheme*.

Section 391 provides in pertinent part at subdivision (b): " 'Vexatious litigant' means a person who does any of the following: (1) In the immediately preceding seven-year period has commenced, prosecuted, or maintained in propria persona *at least five litigations* other than in a small claims court that have been (i) finally determined adversely to the person . . . ." (Italics added.) "Litigation," for purposes of the vexatious litigant statute defining litigation as any civil action or proceeding in any state or federal court (§ 391, subd. (a)), includes appeals and writ proceedings. (*McColm v. Westwood Park Assn.* (1998) 62 Cal.App.4th 1211, 1216-1217.)

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[4] Haycock's status as a licensed attorney does not exempt him from the statutory scheme pertaining to vexatious litigants. (See, e.g., *In re Kinney* (2011) 201 Cal.App.4th 951, 961; *In re Shieh* (1993) 17 Cal.App.4th 1154, 1168.)

Section 391 further provides, at subdivision (b)(3), that a vexatious litigant means a person who, "while acting in propria persona, repeatedly files unmeritorious motions, pleadings, or other papers, conducts unnecessary discovery, or engages in other tactics that are frivolous or solely intended to cause unnecessary delay."

b. *Litigation history (§ 391, subd. (b)(1).)*

This court has taken judicial notice of state and federal court records. (Evid. Code, § 452, subd. (d), § 459.) The records reflect that in the preceding seven years, Haycock has prosecuted in propria persona at least five civil actions, including appeals and writ petitions, which have been finally determined adversely to him. (*Haycock v. McMullen*, No. B185187; *Haycock v. Second Appellate District*, No. S149382; *Haycock v. Epstein* (C.D.Cal.) 2008 WL 2367298; *Haycock v. Epstein* (9th Cir.) No. 08-56150 (Dec. 10, 2009); *Haycock v. Epstein* (2010) 178 L.Ed.2d 31.)

In his response to the order to show cause, which enumerated the above cases, Haycock does not dispute this litigation history. Based on this litigation history, it appears Haycock qualifies as a vexatious litigant within the meaning of section 391, subdivision (b)(1).[5]

c. *Haycock's repeated filing of unmeritorious motions and pleadings in the instant case (§ 391, subd. (b)(3).)*

It also appears that based on the record in the instant case, Haycock qualifies as a vexatious litigant within the meaning of section 391, subdivision (b)(3). The record reflects the following:

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[5] Haycock's litigation activity already has resulted in his being declared a vexatious litigant by another court. We take judicial notice (Evid. Code, § 452, subd. (d), § 459) of an order filed January 5, 2012 in *Haycock v. Epstein* (L.A. County Super. Ct. No. BC467531) granting the motion of defendants, Presiding Justice Epstein, and Associate Justices Suzakawa and Manella, for an order declaring Haycock a vexatious litigant. The January 5, 2012 order requires Haycock to obtain leave of the presiding judge of the court where litigation is proposed to be filed prior to filing any new lawsuits. Haycock appealed to the Fourth Appellate District, Division One (No. D062434), which dismissed his appeal on October 10, 2012.

On March 30, 2011, the trial court granted GE's motion for judgment on the pleadings with 60 days leave to amend. Although the trial court granted Haycock ample time to amend, Haycock did not avail himself of that opportunity. Instead, on May 23, 2011, nearly two months after the trial court granted him leave to amend, Haycock filed a gratuitous "Second Opposition to Defendants' Motion for Judgment on Pleadings."

However, at that juncture there was no pending motion for judgment on the pleadings; the trial court already had ruled on GE's motion for judgment on the pleadings some two months earlier.

On June 16, 2011, GE filed a motion for entry of judgment on the ground Haycock had failed to amend his complaint within the time allowed by the court. GE's motion for entry of judgment was scheduled to be heard on July 18, 2011.

Prior to the hearing on GE's motion for entry of judgment, Haycock belatedly filed an amended complaint, so as to frustrate GE's motion for entry of judgment. On July 8, 2011, ten days before the hearing date on GE's motion, Haycock filed a document captioned "Amended Verified Complaint for Fraud; and for Actual and Punitive damages (proposed)." Although said document was captioned as a complaint, it was essentially a memorandum of points and authorities. On July 8, 2011, Haycock also filed a document captioned "Plaintiff's Opposition to Defendants' Second Motion for Judgment on Pleadings." This document was a reiteration of the legal arguments that Haycock made in the proposed amended complaint filed that same day.

On July 18, 2011, GE's motion for entry of judgment came on for hearing. The trial court denied GE's motion without prejudice, on the ground that "when an amended pleading is filed after the time to amend has expired, the court cannot enter judgment until after defendants move to strike the pleading. Here, plaintiff filed a proposed Amended Verified Complaint after this motion was filed."

GE then was forced to file a motion to strike Haycock's "Amended Verified Complaint" and for entry of judgment in GE's favor. GE argued the amended complaint was untimely, it contained irrelevant and improper matter, and it failed to cure the defects in the original complaint.

On September 7, 2011, the matter came on for hearing. The trial court granted the motion to strike on the ground Haycock filed the amended pleading after the time to amend had expired. The trial court also noted the "Second Opposition to Defendants' Motion for Judgment on Pleadings," which Haycock filed on May 23, 2011, within the 60-day period, consisted of legal arguments and could not be construed as an amended pleading.

Even more peculiarly, on September 7, 2011, the same day the trial court granted the defense motion to strike Haycock's complaint and enter judgment, Haycock filed his own motion for judgment on the pleadings, to be heard the following month. Haycock sought judgment on the pleadings on the ground GE's answer failed to state facts sufficient to constitute a defense to his complaint. (§ 438, subd. (c)(1)(A).)

Haycock's motion for judgment on the pleadings was utterly without merit. First, the motion was untimely in that by September 7, 2011, the trial court already had resolved the lawsuit in favor of GE. Further, Haycock could not prevail on his motion in that the trial court already had determined Haycock's complaint failed to state facts sufficient to state a cause of action against GE. Further, Haycock's motion failed to make any showing as to why GE's answer failed to state facts sufficient to constitute a defense. For all these reasons, Haycock's motion for judgment on the pleadings was completely without merit.

In sum, it appears Haycock's litigation activity in the instant case comes within the ambit of section 391, subdivision (b)(3).

DISPOSITION

The judgment is affirmed.

Respondents' request for sanctions on appeal is granted. Sanctions are imposed against Haycock in the sum of $3,000.00, payable to respondents. The sanctions imposed are to be paid within 30 days after the issuance of the remittitur. Because sanctions exceed $1,000.00, the clerk of this court is directed forthwith to transmit a copy of this opinion to the State Bar. (Bus. & Prof. Code, § 6086.7, subd. (a)(3).)

Haycock is declared a vexatious litigant and therefore is prohibited from filing any new litigation in the courts of this state without first obtaining leave of the presiding judge of the court where the litigation is proposed to be filed. (§ 391.7, subd. (a).) Disobedience of this order is punishable as a contempt of court. (*Ibid*.) The prefiling order applies to appeals and writ petitions, as well as to new litigation in the trial court. (*In re Kinney*, *supra*, 201 Cal.App.4th at p. 961.) The clerk of this court is directed to transmit a copy of this opinion, as well as the Vexatious Litigant Prefiling Order (Judicial Council Form MC-700) to the Judicial Council. (§ 391.7, subd. (f).) " 'Additionally, inasmuch as [Haycock] is an attorney, and engaging in vexatious litigation smacks of grievously unethical conduct, a copy shall be mailed to the State Bar.' [Citation.]" (*In re Kinney*, *supra*, at p. 961.)

In addition to sanctions, respondents shall recover their costs on appeal.

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KLEIN, P. J.

We concur:

KITCHING, J. ALDRICH, J.